

May XX, 2022

State's Attorney's Office

Re: *State v. John Smith*

Dear Mr. XX and Ms. XXX,

John Smith is a two-time Iraq War veteran who is not the “worst of the worst” for whom the death penalty must be reserved. Justice will best be served by forgoing a death notice and proceeding to a non-capital murder trial. Beyond ensuring that the death penalty remains a limited punishment reserved for only the most extremely culpable offenders, a decision to forgo a death notice would avoid the significant financial cost, time, and resources associated with capital trials.

Moreover, forgoing a death notice would avoid the emotional toll imposed—particularly on victims’ families—by a drawn-out death penalty trial and the decades of appeals that follow any death sentence imposed. I would welcome further discussion.

❖ **John Smith Is an Iraq War Veteran Who Voluntarily Served Two Tours in Iraq; He Suffers from PTSD as a Result of His Service.**

- John voluntarily served two tours in the Iraq War in a combat unit. He life was in near constant danger. He was attacked by mortar rounds and IEDs. He received incoming fire and witnessed many dead and dying people.
- Having been surrounded by death month after month, John developed Post Traumatic Stress Disorder. He suffered from symptoms that included night terrors, intrusive thoughts and recurrent memories, hypervigilance, exaggerated startle response, low frustration tolerance, depression, and suicidal ideation.
- After a successful beginning to his military career, John’s combat-induced mental illness tore his life apart. His symptoms lead to the end of his Army career, prison, psychiatric hospitalization, and years of homelessness.

The death penalty is reserved for those who are the “worst of the worst” amongst premeditated murderers; all others accused of premeditated murder face a maximum sentence of life without parole.

John Smith chose to risk his life to serve his country during two combat tours in the Iraq War. As a result of his service, he developed Post Traumatic Stress Disorder, which impaired his ability to manage stress, perceive and respond to threats, and control his impulses.

The charges against John are terrible and tragic. However, John's culpability must be evaluated in the context of his own voluntary sacrifices. Surely a man who, at age 19, put his life and health in jeopardy to protect us all does not fall within the narrow category of the worst of the worst. "[O]ur Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as [John Smith] did." *Porter v. McCollum*, 558 U.S. 30, 43 (2009).

John sought to serve his county and better himself in the Army; he was successful until his experience of life-threatening trauma caused him incapacitating psychological injuries.

Five years after September 11, 2001, when he lived less than 50 miles from the World Trade Center, John volunteered for the United States Army. The United States was at war in both Afghanistan and Iraq. Despite knowing that he would almost certainly go to war thousands of miles from home, he enlisted.¹

John had already worked hard to be successful, both in his own eyes and in the eyes of his physically and emotionally abusive father. He had graduated from high school and had taken a number of college classes. He had worked in retail stores and as a security guard.² He stayed out of trouble. His single arrest was for possession of cannabis and resisting arrest.³

Like many young men from families with low incomes and limited education, military service seemed like a path to success and respect. John joined the Army Reserves and reported every month to Fort Totten.⁴ After a year of successful service, John enlisted in the Army in June of 2006 and was honorably discharged from the reserves.⁵

As an active member of the Army, John was assigned to the highly regarded 82nd Airborne, 319 Field Artillery Regiment. He was originally assigned an administrative job in the postal until, but he chose to sign up for a far more dangerous job in field artillery. His received a Parachutist Badge for successful completion of Airborne training⁶ and completed a driver's training and combatives course.⁷

After a year of training, on June 8, 2007, John was deployed on combat duty in Iraq.⁸ He soon volunteered for another six years of service,⁹ knowing that would result in at least a second, and probably a third, tour in Iraq.

At the end of his first and second combat tours, the Army awarded John the Army Commendation Medal, "for meritorious service . . . during Operation Iraqi Freedom . . . Spc Smith's professionalism and dedication to duty contributed to the unit's success. His actions reflect great credit upon him . . . and the United States Army."¹⁰



John experienced multiple and severe traumas while he was in the Iraqi War.

During later psychological treatment at the Veterans Administration, John was able to describe some of his experiences in Iraq.

John was attached to a combat unit. He escorted supply shipments and worked as field artillery tactical specialist and in the “Quick Response Team.”¹¹

His life was in danger: He was attacked by mortar rounds and IEDs.¹² He saw people injured in battle and killed. He received incoming fire and witnessed many dead and dying individuals.¹³

John was surrounded by death, and his own life was in frequent danger, trauma so severe as to support a diagnosis of Post Traumatic Stress Disorder.

Review of records : childhood trauma (emotional and physical abuse) and military trauma
MILITARY TRAUMA:
Per chart review "The veteran was discharged from the army in 2011, after 2 tours in Iraq. Pt states he was involved in a combat missions including being attacked by motor rounds and IED road bombing. Pt described his war experience and witnessing battle injuries and death. Pt reports he feels anxious and guilty about the experience. Pt reports ongoing nightmares, flashbacks, labile mood and poor anger control. Pt admits hx of anxiety, depressive mood, anxiety and irritability with angry episodes. Denies hx aggressive, assaultive behaviors.

Department of Veterans Affairs, VA James J Peterson Medical Center, Mental Health Admission Evaluation Note, 4/3/2019

John experienced symptoms of trauma-related mental illness. He felt anxious and guilty about his traumatic experiences. He had ongoing nightmares, flashbacks, labile mood, and poor anger control. He had history of anxiety, depressive mood, anxiety, and irritability with angry episodes.¹⁴

After his first tour, the consequences of a year in a combat zone began to show. In the fall of 2008, John was counseled for the first disciplinary infractions of his career: being late for cleaning duties and a hearing test and then for failing to report in proper uniform. During the next month or so, he was counseled for transporting a weapon in his private car and twice when he left formation without permission because he was stressed or let his emotions take over his judgment.¹⁵

Soldiers often feel pressure to hide weakness. A psychologist who evaluated John opined that John “did not want to admit to symptoms that showed his vulnerability.”¹⁶ But by spring, John’s mental illness had become so severe that he sought help for psychiatric symptoms. He reported memory problems that became worse after he returned from deployment, decreased interest in activities, decreased contact with family members due to loss of interest, and isolating himself from friends.¹⁷

Nevertheless, as he had volunteered to do, John went back to war in Iraq in the fall of 2009.¹⁸

Even with his psychological injuries, John did well for two tours in Iraq. He achieved the success and the respect he had sought.

Over the course of his service, the Army awarded John numerous medals and recognition:

- two Army Commendation Medal;
- the Army Good Conduct Medal;
- the National Defense Service Medal;
- the Iraq Campaign Medal;
- the Global War on Terrorism Service Medal;
- the Army Service Ribbon;
- the Overseas Service Ribbon; and
- the Parachute Badge.¹⁹

Unfortunately, John's dedication and hard work weren't enough to overcome the dire effects of Post Traumatic Stress Disorder.

Because John's father had abused him throughout childhood, John was more vulnerable to PTSD as a soldier.

The effects of traumatic events are not additive, they are multiplicative. The trauma from his father's abuse rendered John more vulnerable to injury from the trauma of war and multiplied the injuries that trauma caused.

John's father was "distant, strict, unpleasant, domineering, abusive, [and] faultfinding," and John "felt I was a burden to my parents."²⁰

John told a VA psychologist how, when he was nine years old, his father beat him, tied him up, and put him in the back shed. Another time, John's father poured water over his head, in front of his uncle. When John made a move or responded, his father slapped him across the face, his father and uncle laughed.²¹

John's father beat him until he was around 16. When he complained, his family sent him to a military academy, where he felt betrayed and abandoned, alone and scared.²²

CHILDHOOD TRAUMA

Per Discharge Summary 3/19/2015

"veteran reported "experiences of helplessness and vulnerability are grounded in his childhood experiences marked by prolonged emotional and physical abuse primarily by his father. Vet reported that he was born and raised in White Plains NY, yet that his parents were from Port de Paix Haiti, (costal city 30 miles from the coast). He described his mother as strict, yet his father while the family provider, as often demeaning, and physically abusive. Vet reported an incident at age 9 during one beating his father "tied me up, half naked, and put him in the shed out back". Vet recalled another incident in which his father poured water over his head, in front of his uncle and when veteran made a move

This childhood of traumatic abuse made John more likely to develop severe mental illness when he was faced with the trauma of war.²³

The effects of John's PTSD were debilitating.

The dire effects of John's PTSD became clear when he returned from his second tour in Iraq. He began exhibiting irritability and hypervigilance, both common PTSD symptoms, but which were interpreted as disrespect and poor discipline in the context of the military. John was charged with a number of disciplinary infractions, the most serious of which was his criminal conviction for possession of a weapon and cannabis.²⁴

At the same time, John was suffering from chronic pain. He had lasting shoulder pain after an airborne operation and a bulging disc in his spine.²⁵ His pain was severe and intractable enough that he received a recurring prescription for oxycodone.²⁶

About six months after his second tour, on February 11, 2011, John was separated from the army with a general discharge under honorable conditions.²⁷

He was left without treatment for his PTSD, in debt to the army for his \$13,500 enlistment bonus,²⁸ and unemployed. Four months later, he was arrested in New York for criminal possession of a loaded firearm and sentenced to 42 months in prison.²⁹

During his time in prison, John was held in solitary confinement for long periods,³⁰ which is associated with PTSD.³¹ Because of the racial disparities in solitary confinement and because of the severe psychological harm it causes, New York has banned solitary confinement for more than 15 consecutive days,³² following the lead of other states which have barred or limited the use of long-term isolation in their prisons due to the adverse mental health consequences.³³ John has held in solitary confinement for far longer. Three times he was sentenced to more than 80 days in solitary confinement.³⁴ John left the Army with symptoms of severe mental illness. The conditions of his incarceration made it worse.

John was hospitalized for PTSD

Four days after his release from prison, John went to the Veterans Administration Hospital for a psychiatric evaluation.³⁵ He was hospitalized for three months for substance abuse, Post Traumatic Stress Disorder, and suicidal thoughts. He had severe PTSD symptoms, including "flashbacks, nightmares, night sweats, anxiety, isolation, hypervigilance, guilt, depression, anger, irritability, avoids crowds, relationship problems, trust issues and intrusive thoughts of his military experiences." John had "olfactory hallucinations, [he] smells fuel."³⁶

COMPREHENSIVE INTEGRATED/INTERPRATIVE SUMMARY

Veteran is a 30 year-old single, undomiciled, unemployed NSC combat Iraq War vet who has completed the Building 28 SARTP and was transferred to 15CD for residential PTSD treatment. Vet reports PTSD-related symptoms of anger and irritability with physical outbursts (last time 7 months ago), memory loss, recurrent memories, sleep disturbance, hypervigilance (but not

John was diagnosed with Post Traumatic Stress Disorder and prescribed three different psychotropic medications: Hydroxyzine Pamoate for anxiety/agitation; Prazosin for anxiety and nightmares, and Trazodone for insomnia.³⁷

The injuries John suffered at war were further exacerbated by the circumstances of the war.

Veterans' under-treated and debilitating invisible illnesses are magnified by other realities for those who served in the Iraq and Afghanistan wars:

Unlike previous generations of warriors, this one is relatively small, yet it will have fought the two longest wars in our country's history—simultaneously. Without the draft we relied on in past wars, the burden of the fighting falls on fewer shoulders, with many veterans of this generation serving multiple combat tours. We have also called on them to fight in the most hostile of environments—from the sweltering streets of Iraq, to the hostile high mountains of Afghanistan—facing fanatical enemies prepared to die for their cause. Many of this generation will have survived combat injuries that would have killed them in the past, but will nonetheless bear the psychological scars of their brush with death. Their modern combat training and conditioning ensured that they killed when called on to do so, yet did little to prepare them for the emotional and psychological costs of taking human life.³⁸

Unlike earlier generations of veterans, who “came home from war to ticker-tape parades, a generous G.I. Bill, and a growing economy that offered them a chance at upward mobility,” this much smaller group of soldiers from our recent wars “returned to P.T.S.D, a relatively stagnant economy, especially in rural and semi-rural areas, and an epidemic of drug abuse.”³⁹ “The reality has been that many veterans returned to lives that were materially and spiritually worse than the ones they left, and far worse than the ones they expected.”⁴⁰ This generation of warriors was asked to serve and sacrifice like none before them, but came home to a country that had largely forgotten the wars raging overseas.

John's PTSD prevented him from achieving the stability he sought.

When John left the hospital, he was homeless and unemployed. He was anxious to find work and housing. Probably because of this father's emotional abuse, John has a life-long fear of failure and of being helpless and vulnerable. He was anxious about his future and “where I will go.”⁴¹ He was sent to a homeless shelter.⁴²

John's mental illness made it very difficult to manage. He was homeless for more than a year and a half, and even after he found an apartment, it had little furniture and often no electricity or working refrigerator. John was sometimes able to work as a limo driver, but the

cost of maintaining his car often interfered with his ability to work. He struggled to pay his subsidized rent, and sometimes relied on food stamps to eat.⁴³

Finally, in 2019, John again sought treatment. His goals were “to have someone to talk to; to be more productive.” He was “depressed because he was not where he wanted to be. He would like to be successful . . . John was reluctant to disclose details [about his history] due to feeling ashamed that he fucked up his life.”⁴⁴

John voluntarily sacrificed his safety and his health to serve our country. He is not among the worst of the worst for whom the death penalty is reserved.

The U.S. Supreme Court has repeated on many occasions that the decision to seek the death penalty cannot be made based only on the aggravated nature of the offense. The death penalty must be reserved for the most culpable offenders: “those offenders who commit a narrow category of the most serious crimes **and** whose extreme culpability makes them the most deserving of execution.”⁴⁵

An individual who voluntarily endured war and risked his life to defend our country does not have the “extreme culpability” characteristic of the “worst of the worst” offenders. John did not have any serious criminal history prior to his service in Iraq; he had been arrested once for possession of marijuana and resisting arrest.

Unfortunately, fighting in a war often leaves lifelong scars and can radically alter the trajectory of a returning soldier’s civilian life. While it’s commonly accepted that people who fight in wars come home a different person than when they left, it is much more challenging to mercifully respond to the *reality* of this sacrifice. When veterans return home still experiencing “echoes of war,” it is often “manifested in self-destructive, reckless, and violent behavior.”⁴⁶

John’s wartime experience changed the course of his life. The impact of his service cannot be disentangled from his present situation. John is categorically less culpable than the many individuals accused of premeditated murder who did not volunteer to serve their country and are not living with the lifelong consequences of that choice. That he suffers from mental illness as a result of his service demonstrates that he does not possess the “extreme culpability” that characterizes offenders for whom the death penalty may be an appropriate punishment. John is not “the most deserving of execution” and should face a maximum of life without the possibility of parole, like the vast majority of those accused of premeditated murder in the United States.

❖ **It is Likely that Individuals Suffering from PTSD Will Be Legally Exempted from the Death Penalty in the Near Future.**

- There is bipartisan support in the Wisconsin legislature to exempt persons with PTSD from the death penalty.

Recent years have seen significant nationwide efforts to exempt those with serious mental illness (“SMI”) from imposition of the death penalty. Since 2021, two states that retain the death penalty, Ohio and Kentucky, have passed laws precluding the death penalty for individuals with

SMI.⁴⁷ Wisconsin has also seen recent legislative efforts to exclude seriously mentally ill individuals from execution. In the 2022 legislative session, a bill specifically listing PTSD as an excluding diagnosis passed the Wisconsin Senate with bipartisan support before failing in the House.⁴⁸ This trajectory matches the Kentucky bill, which was introduced on several occasions and only passed in one legislative chamber before ultimately passing in 2022.⁴⁹

Based on the existing bipartisan political support for excluding persons with PTSD from the death penalty in Wisconsin, it is likely support will continue to grow given the national trend. Individuals like John Smith may soon be exempt from the death penalty under Wisconsin law.

Moreover, as additional states adopt laws exempting persons with SMI from the death penalty,⁵⁰ the “evolving standards of decency” analysis inherent in the Eighth Amendment’s cruel and unusual punishment clause will weigh in favor of a constitutional ban. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (prohibiting the execution of intellectually disabled offenders after noting that states’ recent legislative history reflects a “consistency of the direction of change” that “carries ever greater force . . . [because] the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition.”), overruling *Penry v. Lynaugh*, 492 U.S. 302, 305 (1989) (holding that Eighth Amendment does not prohibit execution of intellectually disabled based on perceived lack of national consensus).

Even if the death penalty is obtained at a trial in this case, it is likely that John will become exempt from execution in the future. For example, when *Atkins v. Virginia* was decided in 2002, many individuals already on death row were found to be ineligible for execution due to intellectual disability and were re-sentenced accordingly.⁵¹ Thus, because of John’s pre-existing diagnosis of PTSD, it is unlikely that an execution would ever occur even if he were convicted and sentenced to death.

❖ **Pursuing the Death Penalty against John Smith Will Result in Significant Additional Costs, Resources, Time, and Litigation.**

- Death noticing this case will increase defense costs by hundreds of thousands of dollars, at minimum.
- The scope, quality, and quantity of pre-trial litigation would multiply if the death penalty is a potential sentencing option, substantially increasing the amount of time it will take to bring this case to trial.

Capital cases are unique in the criminal legal system and require numerous additional procedures, investigation, litigation, and experts as compared to non-capital murder cases. Death-noticing a case therefore results in skyrocketing costs. These extraordinary costs multiply during the decades of appeals and post-conviction proceedings if a death sentence is obtained.⁵²

The United States Supreme Court has repeatedly held that “[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”⁵³ As a

result of the heightened reliability required in capital cases, “time and again, the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case.”⁵⁴ Thus, an elevated level of process must be provided to a capital defendant at all stages of the proceedings, including at the merits phase and sentencing phase of trial.

As a corollary to these unique constitutional mandates, my own professional and ethical obligations will change dramatically if a death notice is filed, and these changes will materially impact the timeline and necessary pre-trial litigation in this case. In capital cases, defense counsel is ethically bound by the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. These Guidelines set forth a “national standard of practice for the defense of capital cases”⁵⁵ and have been repeatedly relied on by the U.S. Supreme Court and all levels of reviewing courts in determining the prevailing professional norms and counsel’s obligations.^{56,57} The Guidelines and commentary, which comprise 178 pages, outline the extraordinary amount of time and care that counsel must expend in a death penalty case, establishing standards for everything from qualifications of defense counsel, training, investigation, trial preparation, *voir dire*, and mitigation investigation, amongst several other subjects.

For example, if this case is death noticed, the ABA Guidelines require that Mr. Smith’s defense team consist of no fewer than **two** capital-qualified attorneys, an investigator, and a mitigation specialist.⁵⁸ This will significantly raise the costs of bringing this case in trial. Indeed, in 2018, the ██████████ County Public Defender’s office estimated that taxpayers should expect to spend between \$500,000 to \$1 million dollars on defense costs in a single capital case.⁵⁹ In that fiscal year, the county allotted the Public Defender’s office an additional \$200,000 earmarked specifically for defense expert evaluations, witness fees, and travel expenses for only one of two death-noticed co-defendants, and that figure did not include the costs of court-appointed counsel.⁶⁰ The death notice was ultimately withdrawn twelve months later, but had the case continued as capital, significant additional funding during the following years would have been required to complete the mitigation investigation and to conduct a months-long capital trial.⁶¹

One of the most significant differences between a non-capital murder case and a death penalty case is the sentencing phase of a capital trial, which requires counsel to undertake an exhaustive life history investigation. As the commentary to Guideline 10.7 explains, “[b]ecause the sentencer in a capital case must consider in mitigation, anything in the life of a defendant which might militate against the appropriate of the death penalty for that defendant, penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history.”⁶² With respect to the client, “this begins with the moment of conception.”⁶³ With respect to the client’s family, a comprehensive investigation into *three* generations of the client’s parental family history is necessary in order to present a complete picture of the client’s mitigating life circumstances to the jury.⁶⁴

The required multi-generational bio-psycho-social history investigation involves collecting and analyzing all records that have been generated during the client’s life, in addition to records bearing on family members three generations back. Records to be collected include

“school records[,] social service and welfare records[,] juvenile dependency or family court records[,] medical records[,] military records[,] employment records[,] criminal and correctional records[,] family birth, marriage, and death records[,] alcohol and drug abuse assessment or treatment records[, and] INS records.”⁶⁵ Completed life-history investigations typically result in tens of thousands of pages of records from hundreds of organizations.

The life-history investigation requires interviewing all individuals who have played a significant role in the client’s life or who may be able to shed light on circumstances shaping the client’s life. This includes immediate and extended family, teachers, classmates, neighbors, caseworkers, mental health providers, corrections staff, friends, mentors, and social service workers.⁶⁶ It further involves investigating the communities, agencies, and institutions that served the client, including schools, social service agencies, homeless shelters, and mental-health providers, and investigating the client’s institutional history including commitments to juvenile and adult institutions.⁶⁷ Conducting this type of investigation requires a qualified capital mitigation specialist who is part of the core defense team.⁶⁸ This work is time consuming and expensive, and is a primary reason that capital cases require extensive pre-trial preparation time and hundreds of thousands of dollars in defense costs before a trial even begins.

Failure to complete an exhaustive investigation poses a serious risk of reversal on ineffectiveness grounds. Even looking only to the United States Supreme Court and the Eighth Circuit—courts that will have appellate jurisdiction over this case in the event of a death sentence—many death sentences have been overturned due to incomplete or inadequate investigation for a capital sentencing phase.⁶⁹

Adding to the time-intensive and costly nature of capital proceedings, significant litigation about death-penalty-specific issues must precede any capital trial. Trial counsel is required to preserve “any and all conceivable errors for each stage of appellate and post-conviction review.”⁷⁰ This requirement applies even to legal claims that have previously been rejected by courts in the jurisdiction, because non-preservation can result in waiver if the law changes at a later point in time.⁷¹ This means that the defense team would have to engage in a thorough pre-trial motions practice, including challenges to the constitutionality of the death penalty both facially and as applied to John Smith, as well as constitutional challenges to Wisconsin’s specific capital sentencing scheme. We would also need to thoroughly and extensively litigate the constitutionality of the unique “death qualification” jury selection process that occurs in capital cases. This required ‘scorched earth’ motions practice often results in hundreds of pre-trial motions.⁷² In accordance with our obligation to preserve all issues and create a clear record for appeal, we would ask that every motion, reply, and response be submitted in writing prior to hearing and would ask for evidentiary hearings whenever we believe live witnesses and testimony would strengthen the legal argument.

❖ **Two Necessary Lines of Investigation Will Add to the Cost and Complexity of the Life History Investigation in this Case.**

- Investigations into military service are complex and require sufficient time to overcome institutional barriers to information.
- Because people who are intellectually disabled are ineligible for the death penalty, we must conduct a full investigation and retrospective evaluation in accordance with U.S. Supreme Court precedent.

In a ‘typical’ capital case, the life history investigation is primarily focused on one or two geographic areas where the client has spent his or her life. But veteran status, particularly for clients who actually served in war, adds layers of complexity to this investigation. Military records are voluminous and are held in at least two different locations. Military agencies are also notoriously slow to respond, particularly during the current pandemic.

Additionally, interviews with individuals who served alongside John are a crucial part of investigating his time at war and identifying lay witnesses who can testify about his traumatic experiences to a sentencing jury.⁷³ This effort will require travel to many locations across the country and substantial time and effort dedicated to developing rapport with these potential witnesses and overcoming institutional and individual barriers to disclosure.

In addition to the targeted investigation of John’s military service, we must conduct a full investigation into intellectual disability, which is a categorical bar to the death penalty.⁷⁴ *See Atkins v. Virginia*, 536 U.S. 304 (2002). Most *Atkins* claimants have never been previously diagnosed with intellectual disability,⁷⁵ and thus it is a core responsibility of capital defense counsel to conduct a full investigation to determine if the client is legally ineligible for the death penalty.⁷⁶

The U.S. Supreme Court requires determinations of intellectual disability in capital cases to align with currently prevailing clinical standards.⁷⁷ The instructive clinical texts, the AAIDD and DSM,⁷⁸ define intellectual disability as: (1) intellectual functioning deficits; (2) adaptive functioning deficits; and (3) the onset of deficits during the developmental period.

Adaptive deficits are any deficits present within the broad categories of practical skills, conceptual skills, or social skills.⁷⁹ Significant deficits in just *one* of these areas is sufficient for a diagnosis of intellectual disability.⁸⁰ Moreover, as demonstrated by the examples provided by the AAIDD (*see* note 76), these deficits are nuanced and cannot be identified through a clinical evaluation or via a simple “checklist” approach. Rather, prevailing clinical standards mandate that an investigation into adaptive deficits focuses on how a client functioned day-to-day in his community during the developmental period.⁸¹ This requires extensive record collection and interviews with anyone who may be able to shed light on any adaptive deficits. This includes extended family members, teachers, classmates, employers, colleagues, roommates, landlords, and military superiors and fellow service members.⁸² It is an involved process that will require the use of several experts; oftentimes defense teams require at least three different specialized experts to adequately investigate, develop, and present an intellectual disability claim in a capital case.⁸³

❖ **Seeking and Obtaining a Death Sentence in this Case Will Preclude Closure from the Legal System for the Families of Mr. [REDACTED], Ms. [REDACTED] and Mr. [REDACTED] for Many Years to Come.**

- It will likely take another 24+ months to prepare for a months-long capital trial in this case; however, a non-capital murder case could likely take place this calendar year and last less than two weeks.
- In the event a death sentence is obtained at a capital trial, the uniquely extensive appellate and post-conviction process will leave the victims' families in legal limbo for decades to come.

Recent court hearings have made apparent that the length of capital proceedings will have a detrimental impact on the victims' family. The amount of time required to prepare for a capital trial will be years longer than if this proceeds as a non-capital case. And if a death sentence did result, the unique capital post-conviction process forecloses closure from the legal system for decades.

In non-capital murder cases, there is typically one direct appeal; the conviction is affirmed in the vast majority of cases. As a result, the non-capital appellate process concludes in few years, even if the sentence obtained is life in prison without the possibility of parole, thereby granting a measure of finality for everyone.

In stark contrast, in cases where a death sentence is imposed, the extensive state and federal appellate process typically takes several decades. In addition to the numerous levels of review in state and federal courts, the case is at all times subject to heightened scrutiny, because the "duty to search for constitutional error with painstaking care is never more exacting than in a capital case."⁸⁴ As a result of pairing extensive process with enhanced scrutiny, death penalty cases have an extremely high reversal rate. Well over half—68 percent—of capital cases are reversed for new proceedings due to error.⁸⁵ More often than not, reversal resolves in a non-death resolution. Additionally, a recent comprehensive study conclusively found that capital defendants are also statistically more likely to have their underlying *conviction* reversed in federal post-conviction proceedings as compared to similarly situated non-capital defendants.⁸⁶

Unfortunately, most members of victims' families lack an understanding of the specialized legal process required in capital cases. More often than not, families eventually receive a call—5, 10, or 25 years in the future—informing them that the case has been reversed for error and will start anew. This extensive appellate process subjects victims' families to the continued trauma of ongoing legal proceedings and often subsequent trials or sentencing proceedings many years after an initial conviction and sentence.

Many survivors do not feel that such a drawn-out process best serves their interests in obtaining justice⁸⁷ and desire a more certain and swift conclusion from the legal system.⁸⁸ Unfortunately, once a case has been death noticed, the unique constitutional protections that apply in capital cases leave little room for either of those aims.

In conclusion, pursuing the death penalty in this case will be expensive and time-consuming, will delay closure for the victims' families for many years to come, and is ultimately unlikely to result in execution because of John's Post Traumatic Stress Disorder. This is not the appropriate case in which to seek the death penalty.

Sincerely,

¹ Smith, John, Enlistment Document, Armed Forces of the United States, 4/9/2005.

² Smith, John, Social Security Administration Earnings Records.

³ Smith, John, NCIC report.

⁴ Smith, John, Department of the Army, Order C-06-510002, 6/1/2005.

⁵ Smith, John, Department of the Army, Order 06-263-00022, 9/20/06.

⁶ John, ██████████ Department of the Army, Permanent Order 264-2887.

⁷ Smith, John, Certificate of Release or Discharge from Active Duty, 2/11/11.

⁸ Smith, John, Enlisted Record Brief, 5/18/2010.

⁹ Smith, John, Enlistment/Reenlistment Document, Armed Forces of the United States, 11/7/2007.

¹⁰ Smith, John, Enlisted Record Brief, 5/18/2010; Certificate of Medal.

¹¹ Smith, John, Department of Veterans Affairs, VA Hudson Valley, Physician Emergency Department E & M Note, 1/12/2015.

¹² IEDs were used extensively against U.S. troops, and were responsible for the majority of U.S. casualties in Iraq. *See, e.g., "More Attacks, Mounting Casualties," WASHINGTON POST (Sept. 29, 2007), available at <https://www.washingtonpost.com/wp-dyn/content/graphic/2007/09/28/GR2007092802161.html>.*

¹³ Smith, John, Department of Veterans Affairs, VA James J Peterson Medical Center, Mental Health Admission Evaluation Note, 4/3/2019.

¹⁴ Smith, John, Department of Veterans Affairs, VA James J Peterson Medical Center, Mental Health Admission Evaluation Note, 4/3/2019.

¹⁵ Smith, John, Developmental Counseling Forms, 8/14/2008 – 9/30/08.

¹⁶ Smith, John, Department of Veterans Affairs, VA Hudson Valley, Mental Health Team Note, 12/14/2014.

¹⁷ Smith, John, Medical Chart, May 15, 2009.

¹⁸ Smith, John, Certificate of Release or Discharge from Active Duty, 2/11/11.

¹⁹ Smith, John, Certificate of Release or Discharge from Active Duty, 2/11/11.

²⁰ Smith, John, Department of Veterans Affairs, VA Hudson Valley, Social Work Initial Evaluation Note, 1/14/2015.

²¹ Smith, John, Department of Veterans Affairs, VA Hudson Valley, Social Work Note, 3/12/2015.

²² Smith, John, Department of Veterans Affairs, VA Hudson Valley, Social Work Note, 3/12/2015.

²³ *See, e.g., Paul Frewen, Jenney Zhu & Ruth Lanius, Lifetime Traumatic Stressors and Adverse Childhood Experiences Uniquely Predict Concurrent PTSD, Complex PTSD, and Dissociative Subtype of PTSD Symptoms Whereas Recent Adult Non-Traumatic Stressors Do Not: Results From An Online Survey Study, 10 EUROPEAN J. PSYCHOTRAUMATOLOGY (2019).*

²⁴ Smith, John, Developmental Counseling Forms, 9/3/2010 – 10/22/2010.

²⁵ Smith, John, Medical Records, 11/1/2010.

²⁶ Smith, John, Medical Records, Medications.

²⁷ Smith, John, Certificate of Release or Discharge from Active Duty, 2/11/2011.

²⁸ Smith, John, Defense Military Pay Office, Memorandum for Director, 1/26/2011

²⁹ Smith, John, NCIC report.

³⁰ Smith, John, New York Department of Corrections Records, 8/20/2012 – 12/5/2014.

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- ³¹ See, e.g., Alicia Piper & David Berle, *The Association Between Trauma Experienced During Incarceration and PTSD Outcomes: A Systematic Review and Meta-Analysis*, 30 J. OF FORENSIC PSYCHIATRY & PSYCHOLOGY 854 (2019).
- ³² Troy Closson, *New York Will End Long-Term Solitary Confinement in Prisons and Jails*, NY TIMES (April 1, 2021), available at <https://www.nytimes.com/2021/04/01/nyregion/solitary-confinement-restricted.html>.
- ³³ See *id.* (states including Colorado, New Jersey, Georgia, Nebraska, and New Mexico, and at least eight others).
- ³⁴ Smith, John, New York Department of Corrections Records, 8/20/2012 – 12/5/2014
- ³⁵ Smith, John, Department of Veterans Affairs, VA Hudson Valley, Mental Health Note, 12/8/2014.
- ³⁶ Smith, John, Department of Veterans Affairs, VA Hudson Valley, Nursing Note, 2/17/2015.
- ³⁷ Smith, John, Department of Veterans Affairs, VA Hudson Valley, 12/8/2014 – 4/13/2015.
- ³⁸ Brockton D. Hunter, Esq. & Ryan C. Else, Esq., eds., Introduction to The Attorney’s Guide to Defending Veterans in Criminal Court (2014).
- ³⁹ See Jeffrey Toobin, “Why Are So Many Veterans on Death Row?,” THE NEW YORKER (Nov. 10, 2015).
- ⁴⁰ *Id.*
- ⁴¹ Smith, John, Department of Veterans Affairs, VA Hudson Valley, Team Treatment Note, 4/1/2015.
- ⁴² Smith, John, Department of Veterans Affairs, VA Hudson Valley, Nursing Discharge Note, 4/7/2015.
- ⁴³ Smith, John, Department of Veterans Affairs, VA James J Peterson Medical Center, 05/21/2015 - 10/20/2020.
- ⁴⁴ Smith, John, Department of Veterans Affairs, VA James J Peterson Medical Center, Mental Health Admission Evaluation Note, 4/3/2019.
- ⁴⁵ *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (internal quotations omitted) (emphasis added); see also *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (the Eighth Amendment limits the death penalty to those offenders with “a consciousness materially more depraved” than that of the typical murderer); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (the death penalty “must be limited to those offenders . . . whose extreme culpability makes them the most deserving of execution”); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (noting that “the average murderer” is insufficiently culpable to “justify the most extreme sanction available to the State”).
- ⁴⁶ Brockton D. Hunter, Esq. & Ryan C. Else, Esq., eds., Introduction to The Attorney’s Guide to Defending Veterans in Criminal Court (2014).
- ⁴⁷ Ohio’s bill passed in 2021, and Kentucky’s bill passed in 2022. Both bills passed with overwhelming bipartisan support. See *Ohio Bars Death Penalty for People with Severe Mental Illness*, Death Penalty Information Center (Jan. 11, 2021) (“It passed the state house by a vote of 76 to 18 in June 2019, followed by a 27 to 3 vote on a slightly amended version in the Senate in December 2020.”); *Kentucky Legislature Passes Bill Prohibiting Death Penalty for People with Serious Mental Illness*, Death Penalty Information Center (Mar. 29, 2022) (“[T]he Republican-dominated [Senate] voted 25-9 to pass HB 269, a bill that prohibits the death penalty for defendants diagnosed with any of four specified mental health disorders. The measure overwhelmingly passed the House on February 9 by a vote of 76-19.”).
- ⁴⁸ See *Kentucky and Wisconsin Advance Bills to Bar Death Penalty for People with Severe Mental Illness*, Death Penalty Information Center (Feb. 23, 2022) (Wisconsin Senate passed SB 159 by a vote of 21-14).
- ⁴⁹ *Id.*
- ⁵⁰ Several states have seen legislative efforts to exempt those with serious mental illnesses from the death penalty in recent years, including Arkansas, Arizona, Florida, Missouri, North Carolina, Wisconsin, Tennessee, and Texas. See *Recent Legislative Activity*, Death Penalty Information Center, available at <https://deathpenaltyinfo.org/facts-and-research/recent-legislative-activity>.
- ⁵¹ After the U.S. Supreme Court determined that there was a categorical ban on executing the intellectually disabled in *Atkins v. Virginia*, 536 U.S. 304 (2002), many individuals already on death row brought claims demonstrating they were intellectually disabled and entitled to relief from their death sentence. See, e.g., *Moore v. Texas*, 139 S. Ct. 666 (2019) (finding that defendant Moore, originally convicted in 1980, or 22 years before *Atkins*, had proven his intellectual disability and was ineligible for execution); *Brumfield v. Cain*, 135 S. Ct. 2269 (2015) (holding that an IQ score of 75, raised in a state postconviction proceeding, required investigation and an *Atkins* hearing to determine whether the defendant was intellectually disabled).
- ⁵² A conviction resulting in a death sentence is subject to review first in direct appeal proceedings, followed by state post-conviction proceedings, followed by federal post-conviction proceedings. At all post-conviction stages, counsel is required to undertake a comprehensive investigation into guilt and the defendant’s life history. See American Bar Association Guidelines, 31 HOFSTRA L. REV. 913, 1015 (2003) (Guideline 10.7).
- ⁵³ *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).
- ⁵⁴ *Strickland v. Washington*, 466 U.S. 668, 704-05 (1984) (Brennan, J., concurring in part and dissenting in part).
- ⁵⁵ ABA Guidelines, 31 HOFSTRA L. REV. at 919, Guideline 1.1.

⁵⁶ See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (ABA Guidelines for capital defense are “guides to determining what is reasonable” and “well-defined norms”); *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005).

⁵⁷ The Guidelines have been cited in more than 400 judicial decisions in capital cases. See American Bar Association, Death Penalty Representation Project, List of Opinions Citing the ABA Guidelines for Capital Defense, available at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/allcites.pdf (updated 2021).

⁵⁸ ABA Guidelines, 31 HOFSTRA L. REV. at 952.

⁵⁹ Tiffany Tan, *Big Boost in Funding for Death Penalty Cases*, Rapid City Journal (Oct. 15, 2017), available at https://rapidcityjournal.com/news/local/big-boost-in-funding-for-death-penalty-cases/article_7c54a7a8-3d47-5da2-a38e-59c6424584c6.html.

⁶⁰ *Id.*

⁶¹ Capital trials routinely take months, rather than days or weeks, because of specialized jury selection procedures that require weeks of (often individualized) *voir dire*, the bifurcated merits phase and sentencing phase in front of the jury—in which anything and everything from the defendant’s life or family history is relevant to the sentencing proceeding—and the need for exacting procedures and careful record-making to meet the heightened standards of due process required in capital cases. For example, the last death penalty trial in Colorado lasted four months. See, e.g., KKTV 11, *Jury Selection Under Way in Potential El Paso County Death Penalty Case* (March 8, 2018) (“What’s expected to be a two-months-long jury selection for Glen Galloway began Thursday in El Paso County.”); KKTV 11, *Galloway Sentenced to Life in Prison After Jury Rejects Death Sentence* (July 3, 2018).

⁶² 31 HOFSTRA L. REV. at 1022 (internal citations and quotations omitted).

⁶³ *Id.*

⁶⁴ *Id.* at 1025, n.216; see also Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 HOFSTRA L. REV. 677, 691 (2008) [hereinafter “Supplementary Guidelines”].

⁶⁵ 31 HOFSTRA L. REV. at 1025-26.

⁶⁶ *Id.* at 1024.

⁶⁷ See, e.g., Supplementary Guidelines, 36 HOFSTRA L. REV. at 689.

⁶⁸ ABA Guidelines, 31 HOFSTRA L. REV. at 959 (describing the unique skillset of a mitigation specialist and their integral role on a capital defense team). The core capital defense team must additionally consist of a dedicated fact investigator who is responsible for a scorched-earth investigation related to the merits phase. *Id.* at 958; see also *id.* at 1018-1020 (describing merits phase investigation).

⁶⁹ The following cases are a few examples of capital cases reversed for inadequate investigation at the sentencing phase:

- *Andrus v. Texas*, 590 U.S. ____ (June 15, 2020) (per curiam) (counsel clearly provided deficient performance by not only failing to perform an adequate mitigation investigation and “overlooking vast tranches of mitigating evidence” including the fact that his client suffered “very pronounced trauma” and suffered from “affective psychosis” by the time he was eleven years old, but also by presenting a minimal amount of mitigation investigation that “backfired by bolstering the State’s aggravation case” and by failing to adequately investigate and rebut the State’s case in aggravation; remand required for the lower court to address prejudice prong of *Strickland*).
- *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam) (counsel provided ineffective assistance by failing to investigate mitigating evidence regarding defendant’s mental capacity, family background, or military service).
- *Rompilla v. Beard*, 545 U.S. 374 (2005) (even when a capital defendant and his family members have said that no mitigating evidence is available, his lawyer is bound to conduct a social history investigation and adequately follow up on ‘red flags’; hiring three well-reputed mental health experts without conducting the proper life history investigation still constituted ineffective assistance of counsel).
- *Wiggins v. Smith*, 539 U.S. 510 (2003) (counsel’s failure to fully investigate Wiggins’ background and present mitigating evidence of his “excruciating life history” violated his Sixth Amendment right to counsel).
- *Williams v. Taylor*, 529 U.S. 362 (2000) (counsel ineffective for failing to uncover and present evidence of defendant’s “nightmarish childhood,” borderline mental retardation, and good conduct in prison).
- *Simmons v. Luebbbers*, 299 F.3d 929 (8th Cir. 2002) (defendant was prejudiced by his attorneys’ failure to introduce mitigating evidence of his childhood beatings, assault and robbery by stranger, and impoverished upbringing, where evidence could have demonstrated that defendant’s compulsive, violent reactions to rejection by women were the result of an abusive and traumatic childhood and may have influenced the jury’s assessment of his moral culpability).

- *Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991) (counsel ineffective for failing to investigate and present mitigation evidence related to family history, mental disorders and conditions, and alcohol dependency).
- *Hill v. Lockhart*, 28 F.3d 832 (8th Cir. 1994) (defendant received ineffective assistance of counsel in penalty phase of capital trial where defense counsel failed to present evidence of defendant’s psychiatric history involving his schizophrenic tendencies when not taking antipsychotic drugs).
- *Antwine v. Delo*, 54 F.3d 1357 (8th Cir. 1995) (death sentenced reversed, in part, due to counsel’s failure to effectively present evidence of client’s mental impairment at the penalty phase; counsel failed to follow up on indications that client suffered from bipolar disorder).

⁷⁰ 31 HOFSTRA L. REV. at 1030.

⁷¹ *Id.* at 1030, 1032 (describing a case in which, from a joint capital trial, one co-defendant was eventually executed because his counsel failed to object to women being excluded from the jury, while the other co-defendant’s case was reversed, and he is now serving life in prison because his attorneys preserved the issue).

⁷² See, e.g., *Edward Montour v. Colorado*, 02CR782, Douglas County (2007-2010) (over 400 motions and replies filed by defense team in a case where the defendant, already serving life in prison for murder, was accused of murdering a prison guard; the case ultimately pled to a life sentence); *United States v. Tsarnaev*, 1:13-cr-10200 (D. Mass), docket available at https://www.courtlistener.com/docket/4275182/united-states-v-tsarnaev/?order_by=desc&page=7.

⁷³ This type of detailed information about John’s time in the military is crucial to a jury’s sentencing determination in a capital case. See, e.g., *Porter v. McCollum*, 558 U.S. 30, 43-44 (2009) (reversing 1988 death sentence for counsel’s failure to conduct sufficient life history investigation, including the failure to investigate and contextualize “the extreme hardship and gruesome conditions” of his combat service in the Korean War).

⁷⁴ For example, preliminary investigation has found that John had many failing grades and scored in the third to seventh percentile on a standardized test which are red flags for intellectual functioning deficits and has had repeated difficulties maintaining employment and suitable housing, which are red flags of adaptive functioning deficits.

⁷⁵ See Edward Polloway, *The Death Penalty and Intellectual Disability*, American Association on Intellectual and Developmental Disabilities at p. 222 (2015) (“Although the majority of *Atkins* petitioners have a clear history of school failure and nonachievement, many of them (including many whose *Atkins* petitions were ultimately successful) were never labeled ID in school.”).

⁷⁶ See, e.g., ABA Guidelines, 31 HOFSTRA L. REV. at 956.

⁷⁷ See *Hall v. Florida*, 572 U.S. 701 (2014) (striking down state test that improperly restricted definition of ID in contravention of clinical standards); *Moore v. Texas*, 137 S. Ct. 1039 (2017) (same).

⁷⁸ The U.S. Supreme Court has extensively referenced these two manuals in their decisions regarding intellectual disability as a categorical bar to the death penalty. See generally *Atkins v. Virginia*, 536 U.S. 304 (2002); *Hall v. Florida*, 572 U.S. 701 (2014) (striking down state test that improperly restricted definition of ID in contravention of clinical standards); *Moore v. Texas*, 137 S. Ct. 1039 (2017) (same); *Moore v. Texas*, 139 S. Ct. 666 (2019) (reversing Texas court a second time and concluding that Mr. Moore had proven he was intellectual disabled in accordance with clinical standards). The most current guides are the American Association on Intellectual and Developmental Disabilities clinical manual, 12th Edition (2021) (AAIDD-12) and The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5).

⁷⁹ The AAIDD gives examples of limitations in each domain that a person with intellectual disability may experience.

Conceptual skills: impaired independent planning, problem solving, or thinking abstractly; difficulty in choosing a good solution when confronted with a problem or situation; difficulty effectively using ideas or symbols such as time or mathematical functions; difficulty effectively communicating thoughts or ideas; difficulty in self-direction and/or arranging or planning future life activities; difficulty with academics (reading, writing, arithmetic); difficulty with money/financial concepts

Social skills: impaired social/interpersonal skills and learning from experiences; difficulty in working effectively with others towards group problem solving; inflexible and concrete thinking and acting during complex social situations; increased vulnerability and victimization, especially concerning who can be trusted, whom to follow, and what circumstances are safe; inadequate social responding and social judgment; tendency to deny or minimize the disability to their detriment; strong desire to please authority

figures based on limited understanding of the situation; gullibility, naivete, and suggestibility in interactions with others

Practical skills: limitations in self-care and domestic skills; limitations in work skills such as obtaining a steady job that covers expenses, meeting work competencies, getting along with co-workers and managers, handling job conflict appropriately, maintaining high-quality work under pressure; limitations in use of money (e.g., making change, value of currency, paying bills) and property (e.g., giving “loans” to people who do not pay back, signing away property or rights, making purchases inconsistent with his or her budget/means); limitations in maintaining a safe environment related to one’s self and one’s children, household cleaning products, foot storage, medicine/drugs, or using caution or protecting others from electricity, vehicles, and machines

AAIDD-12 at 30.

⁸⁰ DSM-5 at 38 (deficits in only one of the three adaptive-skills domains suffice to show adaptive deficits); *see also Moore*, 137 S. Ct. at 1050 (citing this language from the DSM).

⁸¹ AAIDD-12 at 41 (explaining how to conduct a retrospective investigation, which is always necessary in criminal cases when there is no previous diagnosis).

⁸² *See* International Justice Project, “A Practitioner’s Guide to Defending Capital Clients Who Have Mental Retardation/Intellectual Disability” (Dec 2010) at 26-31. These extensive interviews are required because adaptive functioning must be measured as a person’s *typical* functioning within the *community*. Assessments made in structured settings such as prisons or jails are often inaccurate. *See Moore*, 137 S. Ct. at 1050 (“[T]he [Texas court] stressed Moore’s improved behavior in prison. Clinicians, however, caution against reliance on adaptive strengths developed ‘in a controlled setting,’ as a prison surely is. DSM-5 at 38 (‘Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained.’).”

⁸³ *See, e.g., U.S. v. Davis*, 611 F. Supp. 2d 472 (2009) (capital trial team required five experts to present intellectual disability—a pediatric neuropsychologist, a doctor of psychology, a doctor of clinical psychology specializing in special education and adaptive behavior, an M.D. specializing in developmental pediatrics and child neurology, and an M.D. specializing in psychiatry); *U.S. v. Roland*, case 2:12-cr-00298-ES (N.J. 2017) (capital trial team required four experts to present ID claim during 18-day evidentiary hearing—a developmental clinical neuropsychologist, a psychologist specializing in and nationally known for his work in ID, a board-certified clinical neuropsychologist, and a psychometrician with a Ph.D. in educational psychology); *U.S. v. Smith*, case 2:04-cr-00017-HGB-SS (E.D. La. 2011) (capital trial team required three experts to present ID claim—a psychologist with a dual degree in clinical psychopharmacology, a clinical psychologist specializing in forensic psychology and ID, and a psychologist specializing in development disabilities and ID).

⁸⁴ *Beck v. Alabama*, 447 U.S. 625 (1980).

⁸⁵ Researchers conducted a comprehensive 23-year study, including 5,500 judicial decisions, reviewing outcomes of death sentences that had been fully reviewed through the appellate and post-conviction process and were final. Reversible error was found in 68 percent of the cases. *See* Columbia University News, “Landmark Study Finds Capital Punishment System Fraught with Error: Serious, Reversible Error Found in Nearly 7 out of 10 Capital Cases in 23 Year Period” (June 12, 2000), available at <http://www.columbia.edu/cu/pr/00/06/lawStudy.html#footnote1>.

⁸⁶ *See* Brett Parker, “Is Death Different to Federal Judges? An Empirical Comparison of Capital and Noncapital Guilt-Phase Determinations on Federal Habeas Review,” 72 STANFORD L. REV. 1655 (June 2020). The author analyzed 1,368 votes cast by federal appellate judges between 2013 and 2017 in murder cases heard on habeas review, and in each of those cases the defendant was under a sentence of either death or life in prison. After controlling for several variables, the data demonstrated that “federal appellate judges are significantly more likely to grant guilt-phase relief to capital defendants than they are to similarly situated noncapital defendants.” *Id.* at 1655.

⁸⁷ *See, e.g.,* Tiffany Tan, “State Withdraws Death Penalty in Rehfeld Murder Case,” Rapid City Journal (April 16, 2018) (the victim’s family preferred a non-death resolution so that the case would not drag out for decades).

⁸⁸ *See, e.g.,* Ben Jones, “Connecticut Repeal of Capital Punishment Signals National Trend” (May 16, 2012) (quoting a letter from 76 murder victims’ family members to Connecticut lawmakers in favor of eliminating capital punishment in the state: “The reality of the death penalty is that it drags out the legal process for decades. In Connecticut, the death penalty is a false promise that goes unfulfilled, leaving victims’ families frustrated and angry after years of fighting the legal system.”), available at <https://www.jurist.org/commentary/2012/05/ben-jones-capital-punishment/>.